RECORD AND BRIEFS.

FILED
JAN 19 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 15-9260

In the Supreme Court of the United States

LEVON DEAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
DAVID BITKOWER
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DAVID B. GOODHAND
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a sentencing court, when sentencing a defendant who has been convicted of a firearms offense under 18 U.S.C. 924(c) and a predicate crime of violence, may reduce the sentence for the predicate offense to lower the aggregate sentence that results from the consecutive, mandatory-minimum sentence for the Section 924(c) offense.

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OPINION BELOW

The opinion of the court of appeals (J.A. 45-67) is reported at 810 F.3d 521.

JURISDICTION

The judgment of the court of appeals (J.A. 68) was entered on December 29, 2015. A petition for rehearing was denied on February 12, 2016 (J.A. 70). The petition for a writ of certiorari was filed on May 4, 2016, and granted on October 28, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted on one count of conspiracy to commit Hobbs Act robbery and two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; two counts of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1);

and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g). J.A. 31, 33. The district court sentenced petitioner to 400 months of imprisonment, to be followed by three years of supervised release. J.A. 33, 35. The court of appeals affirmed. J.A. 45-67.

1. In April 2013, petitioner, his co-defendant brother (Jamal Dean), and others conspired to rob and robbed drug dealers of drugs and other property. J.A. 46-48. In each of the two robberies, petitioner and his brother brought a modified .22-caliber semiautomatic Mossberg rifle that they used to facilitate the robberies by threatening, intimidating, and battering their victims. Tr. 48-49, 52-54, 84-85, 194-196, 262-263, 272-273, 279, 405; see Tr. 125, 157, 328-329.

a. Jeffrey Rollinger (J.R.) was a known methamphetamine and marijuana dealer who sold drugs in Iowa and South Dakota. J.A. 53; Tr. 41, 60. Although J.R. sold such drugs for money, he also had previously sold methamphetamine to Sarah Berg (one of petitioner's co-defendants) and Jessica Cabbell (a prostitute) in exchange for sex. Tr. 42-43, 61, 146. Berg believed that J.R. had stolen $400 from her, and, while at a home in South Sioux City, Nebraska, she hatched a plan with petitioner, petitioner's brother, and Cabbell to rob J.R. when he was scheduled to have a "date" with Cabbell. Tr. 80-83, 146, 148-151, 169. Petitioner and Jamal were the "muscle" for that robbery. Tr. 151. As they prepared to execute their plan, petitioner was next to Jamal, who brandished the Mossberg rifle, which he could conceal in his pants because its handle had been modified, reducing its length to only two or three feet. Tr. 76-77, 83-85, 322;

see Gov't Exh. 33.8 (D. Ct. Doc. 286-96) (photograph of rifle).

On April 15, 2013, the group traveled to the motel in Sioux City, Iowa, at which Cabbell had agreed to meet J.R. for the "date." Tr. 120-121, 150. Cabbell first met with J.R. in his motel room, and the two began to smoke methamphetamine. Tr. 123, 152. A few minutes later, Berg, petitioner, and Jamal entered the room. Tr. 47-48, 123, 152-153. Berg confronted J.R. about her money, Tr. 48, 153; Jamal pulled the Mossberg rifle on J.R. and demanded money and drugs, Tr. 48-49, 155; and, while Jamal kept the rifle on J.R., petitioner "ransack[ed] the room looking for * * * drugs or money." Tr. 49-50; see Tr. 156. When J.R. attempted to stand, Jamal smashed the rifle's butt into J.R.'s head and threatened his life. Tr. 52, 54, 125, 154; see Tr. 57, 180.

The group ultimately failed to find any significant amount of drugs or money. Tr. 88, 131. They instead took J.R.'s pipe containing a small amount of methamphetamine, his cell phone, his car keys, and his car, which they drove back to Nebraska. Tr. 52-53; see Tr. 69, 131-132, 155-156.

b. Nine days later, early in the morning of April 24, 2013, petitioner and his brother robbed another interstate drug dealer, Craig Barclay (C.B.), at his home. J.A. 48; Tr. 188, 191-192, 194-196; see J.A. 53; Tr. 188-190 (interstate drug dealing). After entering the house, petitioner abruptly awoke C.B. in his bed and threatened him while Jamal pointed the rifle at the drug dealer. Tr. 192, 194-195. Jamal used the rifle to provide "cover[]" for petitioner and prevent C.B. from getting "out of hand," Tr. 201, enabling petitioner to take C.B.'s wallet, the contents of C.B.'s

pockets, and items from C.B.'s room. Tr. 195-196, 198-199. After C.B. had given the brothers all he had, Jamal raised the rifle over his head and brought it crashing down on C.B.'s skull. Tr. 196-197.

The brothers forced petitioner's former girlfriend, who was then living at C.B.'s house, to grab her belongings and leave with them in C.B.'s two cars. Tr. 256, 260-261. As they departed the house, petitioner carried the rifle and, as he entered a car, he placed the rifle on the floorboard between his legs. Tr. 262-263, 272-273, 279. In the end, the brothers robbed C.B. of approximately $300 in cash, 20 grams of the methamphetamine, a digital scale, a laptop computer, various other smaller items, and C.B.'s two cars. Tr. 198-200, 202-203, 261-262.

2. a. A federal jury found petitioner guilty on one count of conspiracy to commit Hobbs Act robbery (Count 1), in violation of 18 U.S.C. 1951(a); two counts of Hobbs Act robbery for the robberies of J.R. and C.B. (Counts 2-3), in violation of 18 U.S.C. 1951(a) and 2; two counts of possessing a firearm in furtherance of those crimes of violence (Counts 6 and 7), in violation of 18 U.S.C. 924(c)(1) and 2; and one count of possessing a firearm after having been convicted of a felony (Count 9), in violation of 18 U.S.C. 922(g). Verdict Form 11-18 (D. Ct. Doc. 284); see J.A. 31, 33; Third Superseding Indictment 3-14 (D. Ct. Doc. 154).

Petitioner's three Hobbs Act offenses are each punishable by a term of imprisonment of up to 20 years, 18 U.S.C. 1951(a); his felon-in-possession offense is punishable by a term of imprisonment of up to ten years, 18 U.S.C. 924(a)(2); and a sentencing judge has discretion to impose prison terms for those offenses

that run concurrently with each other and other terms of imprisonment. See 18 U.S.C. 3584(a) and (b).

Petitioner's convictions under Section 924(c) contain distinct sentencing instructions. Section 924(c) makes it an offense to "use[] or carr[y] a firearm" "during and in relation to any crime of violence or drug trafficking crime" or to "possess[] a firearm" "in furtherance of any such crime." 18 U.S.C. 924(c)(1)(A); see 18 U.S.C. 921(a)(3), 924(c)(2) and (3) (defining "firearm," "drug trafficking crime," and "crime of violence"). A Section 924(c) offense is thus "a combination crime," the basic version of which has as its elements both (1) the relevant possession, "use[,] or carriage of a gun" and (2) "the commission of a predicate (violent or drug trafficking) offense." *Rosemond* v. *United States*, 134 S. Ct. 1240, 1245, 1247-1248 (2014). When present "together[,] [those two elements] pose an extreme risk of harm." *Id.* at 1248.

Section 924(c) accordingly provides that "any person who" violates its prohibitions "shall, in addition to the punishment provided for [the predicate] crime of violence or drug trafficking crime," be "sentenced to a term of imprisonment of not less than 5 years" and, "[i]n the case of a second or subsequent conviction under [Section 924(c)]," to "a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(A)(i) and (C)(i). "Notwithstanding any other provision of law," "no term of imprisonment imposed on a person under [Section 924(c)] shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C.

924(c)(1)(D)(ii). In addition, Section 924(c) provides that "a court shall not place on probation any person convicted of a violation of [Section 924(c)]." 18 U.S.C. 924(c)(1)(D)(i).

b. At sentencing, petitioner agreed that, under the advisory Sentencing Guidelines, his three Hobbs Act counts (Counts 1-3) and his felon-in-possession count (Count 9) each carried an overall advisory Sentencing Guidelines range of 84 to 105 months. J.A. 15-17. But petitioner requested that the district court grant a downward variance and impose concurrent sentences of just one day for those four felony counts. J.A. 17-18. Petitioner argued that such a variance was warranted because the two remaining Section 924(c) counts carried "mandatory" five- and 25-year consecutive sentences and because, in petitioner's view, an aggregate sentence of 30 years of imprisonment was "more than sufficient to accomplish the goals of sentencing and to account for the criminal conduct in this case." J.A. 18; see J.A. 17-25.

The district court partially denied petitioner's request. J.A. 25-27. The court granted a downward variance from the 84-to-105-month Guidelines range to 40 months of concurrent imprisonment for each of petitioner's four non-Section 924(c) felonies. J.A. 15, 25. The court based that variance on its conclusion that petitioner "was much more of a follower" and "wasn't the weapons guy" in the counts of conviction and petitioner's "fairly extensive criminal history" involved "relatively minor things" without "any significant history of any violence." J.A. 25-26.

The district court declined to grant petitioner's request to vary further to just one day of imprisonment. J.A. 20, 23, 26-27. The court concluded that it must

"separately" evaluate the sentences for the non-Section 924(c) counts and the Section 924(c) counts and did not in this context have discretion to base its judgment on "the overall sentence" that would result. *Ibid.* "[I]f [it] w[ere] just looking at the conduct in [the Hobbs Act counts]," the court stated, "there's no way" that it would "vary down to one day" from the 84 months at the bottom of the Guidelines range, and it doubted that any "judge in the country" would grant such "an extraordinary variance." J.A. 23; see J.A. 20. The court accordingly "var[ied] down[ward]" to 40 months of imprisonment for petitioner's non-Section 924(c) felonies, J.A. 25, which when added to the 360 months of consecutive, mandatory-minimum sentences for petitioner's Section 924(c) counts, yielded a total sentence of 400 months of imprisonment, J.A. 27.

The district court further stated that it would "make a record" on which petitioner could appeal, adding that if petitioner were correct that the court could impose a single sentence as "a combined package," the court would sentence petitioner "to the two mandatory minimums which total 360 months and then give 1 additional day" for each of petitioner's four remaining felony convictions. J.A. 25-26.

3. The court of appeals affirmed. J.A. 45-67. As relevant here, the court held that the district court correctly rejected petitioner's request to impose a one-day concurrent sentence for each of his four non-Section 924(c) felony counts of conviction. J.A. 66-67. The court explained that it had previously held that a district court had unreasonably "sentenc[ed] a defendant to one day for the crimes not subject to [Section 924(c)'s] mandatory minimum, solely because the mandatory sentence was 300 months." J.A. 66 (dis-

cussing *United States* v. *Hatcher*, 501 F.3d 931, 933-934 (8th Cir. 2007), cert. denied, 552 U.S. 1170 (2008)). Because petitioner had identified "no meaningful difference between the situation in *Hatcher* and what [petitioner] requested in this case," the court concluded that the sentencing court did not abuse its discretion in declining to grant petitioner's request for one-day concurrent sentences. J.A. 67.

SUMMARY OF ARGUMENT

Petitioner requests that the sentences for his four non-Section 924(c) felonies be reduced to just one day in order to offset the effect of the mandatory-minimum sentences that Congress required for his firearms offenses under Section 924(c). That reduction is legally impermissible.

A. Section 924(c) requires that a court "shall" impose a mandatory five-year (or longer) sentence "*in addition to the punishment* provided for [the predicate offense]," 18 U.S.C. 924(c)(1)(A) (emphasis added), and directs that the additional punishment shall be imposed consecutively to "any other term of imprisonment," 18 U.S.C. 924(c)(1)(D)(ii). As such, "§ 924(c)'s longstanding thrust" has been "its insistence that sentencing judges impose *additional* punishment for § 924(c) violations" beyond the sentence for the predicate offense, a "command[] that [ensures that] all § 924(c) offenders shall receive additional punishment for their violation of that provision." *Abbott* v. *United States*, 562 U.S. 8, 20, 25 (2010).

Petitioner's submission would impermissibly allow a sentencing judge to reduce the sentence for the predicate and other non-Section 924(c) offenses to just one day *because* of the judge's belief that the total length of imprisonment that would result from Section

924(c)'s mandatory consecutive sentence is more than what is necessary. That outcome would negate the "addition[al]" term of imprisonment that Congress has required and its specific direction that the additional punishment must be "not less than five years," 18 U.S.C. 924(c)(1)(A)(i), thus effectively permitting sentencing judges to "carve out statutory exceptions [from Section 924(c)] based on judicial perceptions of good sentencing policy." *United States* v. *Gonzales*, 520 U.S. 1, 10 (1997).

B. The sentencing provisions of the Sentencing Reform Act, which Congress enacted at the same time as its revision to Section 924(c)'s sentencing provisions, confirm that understanding. Ordinarily, a sentencing court, after first separately establishing a sentence on each count of conviction that is appropriate for "the offense" in question, 18 U.S.C. 3553(a)(1) and (2); see 18 U.S.C. 3582(a), has discretion to set the total, aggregate length of imprisonment. It does so by virtue of specific statutory authority to make the separate terms of imprisonment for multiple offenses either wholly concurrent, partially overlapping, or fully consecutive. 18 U.S.C. 3584(a) and (b). Section 924(c), however, divests judges of that Section 3584 authority to set the total length of imprisonment by requiring that the Section 924(c) sentence run consecutively to all other terms of imprisonment. 18 U.S.C. 924(c)(1)(D)(ii). Petitioner's submission would impermissibly circumvent that important limitation.

C. Section 924(c)'s drafting history demonstrates Congress's intent to withdraw discretionary sentencing authority that might otherwise allow sentencing judges to eliminate Section 924(c)'s mandatory additional punishment. The relevant sentencing provi-

sions, which took form in January 1971 and were perfected in 1984, are designed to impose "a mandatory additional prison sentence for criminals who choose to resort to firearms" by "compel[ing] [those criminals] to *serve additional time in prison solely* for deciding to use a firearm." 115 Cong. Rec. 2567 (1969) (statement of Sen. Mansfield) (emphasis added). Original drafting deficiencies failed to withdraw discretion that could frustrate that goal and, in 1984, Congress took care to eliminate such loopholes by displacing every sentencing process—concurrent sentencing, suspension of imprisonment, probation, and parole—that might potentially stand as a barrier to that objective.

D. Petitioner argues that Congress merely intended Section 924(c)'s mandatory-minimum sentences to set a floor that ensures that offenders serve at least that amount of time in prison. That assertion, however, fails to account for Congress's separate provision of additional and consecutive punishment. Indeed, this Court has itself previously rejected the very same argument that petitioner resubmits in this case. *Abbott*, 562 U.S. at 20, 24.

Petitioner's position would result in anomalous sentencing outcomes that punish less culpable Section 924(c) offenders more harshly for the firearm offense than more serious offenders. The only apparent function of petitioner's reduced-to-one-day sentencing regime would be to avoid the congressionally imposed consecutive, additional, mandatory-minimum sentences in Section 924(c). That is reason enough to reject it.

E. The advisory Sentencing Guidelines establish a permissible method of sentencing in this Section 924(c) context. That framework requires a separate

calculation of a range on the predicate offense and acknowledges the limits on sentencing discretion to adjust the aggregate length of the resulting multiple terms of imprisonment. Those limits thus appropriately account for the mandatory additional and consecutive sentence under Section 924(c).

F. Petitioner's position is not supported by a judge's authority to consider any information about a defendant's "background, character, and conduct" during sentencing. 18 U.S.C. 3661. Even if the informational areas addressed by Section 3661 were thought to include consideration of statutorily mandated sentences that must be imposed on other counts of conviction, Section 924(c)'s relevant sentencing restrictions flow from provisions that curtail the scope of a judge's sentencing authority, not the information the judge may consider. The government has never argued that a judge must blind himself to any relevant facts, merely that a judge must exercise discretion within the constraints imposed by Congress.

G. Finally, petitioner argues that the aggravated identify-theft provisions in Section 1028A show that Congress could have drafted language specifically prohibiting courts from reducing sentences for predicate offenses based on a Section 924(c) sentence. But the provisions petitioner invokes impose a broader prohibition than that involved here. In any event, Section 1028A, which Congress enacted decades after Section 924(c)'s relevant sentencing provisions, is an unreliable guide for inferring congressional intent underlying Section 924(c).

ARGUMENT

THE DISTRICT COURT CORRECTLY REJECTED PETITIONER'S INVITATION TO IMPOSE ONLY ONE DAY OF IMPRISONMENT FOR EACH OF PETITIONER'S FOUR NON-SECTION 924(c) FELONY OFFENSES

Section 924(c) makes it a crime to use, carry, or possess a firearm in connection with any federal crime of violence or drug trafficking crime. 18 U.S.C. 924(c)(1)(A). Any person who violates that prohibition "shall, in addition to the punishment provided for [the predicate] crime of violence or drug trafficking crime," be "sentenced to a term of imprisonment of not less than 5 years" and, "[i]n the case of a second or subsequent conviction under [Section 924(c)]," shall "be sentenced to a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(A)(i) and (C)(i). Section 924(c) further provides that, "[n]otwithstanding any other provision of law," no term of imprisonment imposed under Section 924(c) "shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for [the predicate offense]." 18 U.S.C. 924(c)(1)(D)(ii).

Those provisions, particularly when read in conjunction with the sentencing provisions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*), reflect Congress's intent that sentencing courts (1) impose a criminal sentence for the conduct underlying any non-Section 924(c) count of conviction that is appropriate for that offense and then (2) impose the punishment for the Section 924(c) offense on top of such a sentence. That reading is confirmed by Section 924(c)'s drafting history, which reflects Congress's repeated

strengthening of the statute's sentencing provisions. Indeed, as this Court has observed, the "longstanding thrust" of Section 924(c) is "its insistence that sentencing judges impose *additional* punishment for § 924(c) violations." *Abbott* v. *United States*, 562 U.S. 8, 20 (2010).

Nothing in Section 924(c) or in the overall framework for sentencing established by the Sentencing Reform Act supports the "implausible" conclusion that Congress left courts free to negate the imposition of "additional punishment for § 924(c) violations," *Abbott*, 562 U.S. at 20 (emphasis omitted), by zeroing out sentences for separate and simultaneous convictions in order to offset the mandatory-minimum prison sentence that Congress adopted for Section 924(c). Petitioner's contrary contention fails to account for the language of Section 924(c) and the relevant provisions of the Sentencing Reform Act, rests on a misreading of Section 924(c)'s drafting history, and, if adopted, would produce anomalous sentencing results.

A. Section 924(c)'s Text And Function Mean That A Court May Not Impose A One-Day Sentence For A Predicate Offense That Would Not Be Appropriate Absent The Additional Punishment Under Section 924(c)

Three primary textual features demonstrate that a district court may not reduce a term of imprisonment for a Section 924(c) predicate offense below the length that would be appropriate if the defendant were not also subject to punishment under Section 924(c). Section 924(c)'s distinctive status as a "combination" offense that builds upon a federal predicate offense, Congress's direction to impose a mandatory sentence "in addition to the punishment provided for [that predicate offense]," 18 U.S.C. 924(c)(1)(A), and Con-

gress's order to run the term of imprisonment under Section 924(c) consecutively to any other term of imprisonment, 18 U.S.C. 924(c)(1)(D)(ii), together mean that a district court may not impose otherwise-unjustified prison terms of just one day for each of petitioner's two predicate Hobbs Act robberies and his two other felony convictions in order to offset the full impact of Section 924(c)'s mandatory-minimum term of imprisonment.

1. Section 924(c) makes it "a discrete offense to use, carry, or possess a deadly weapon in connection with [certain federal predicate offenses]." *Abbott*, 562 U.S. at 12. The "basic" offense under Section 924(c) is "using or carrying a firearm during and in relation to a violent or drug trafficking crime, or possessing a firearm in furtherance of any such crime." *Dean* v. *United States*, 556 U.S. 568, 574 (2009). The statute therefore constitutes a type of "combination crime," requiring proof of both "the commission of a predicate (violent or drug trafficking) offense" and the relevant possession, "use[,] or carriage of a gun." *Rosemond* v. *United States*, 134 S. Ct. 1240, 1245, 1248 (2014). As such, anyone who violates Section 924(c) is "guilty of unlawful conduct twice over": He is guilty both of "a violent or drug trafficking offense" punishable under federal law and of violating Section 924(c)'s distinct prohibition against "the use, carrying, or possession of a firearm in the course of that offense." *Dean*, 556 U.S. at 576.

That distinctive feature of Section 924(c) reflects the statute's important function. A criminal who engages in a predicate offense "for which"—in the words of Section 924(c)—"the person may be prosecuted in a court of the United States," 18 U.S.C. 924(c)(1)(A), is

guilty of a "federal crime[]." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). The government therefore could already prosecute the criminal under federal law in federal court without recourse to Section 924(c). Congress, however, deemed the punishment imposed by federal courts for such a predicate offense to be insufficient. It accordingly enacted Section 924(c) to punish yet further "the temporal and relational conjunction of [the] two separate acts" of the predicate offense and the use, carrying, or possession of a firearm "on the ground that together they pose an extreme risk of harm." *Rosemond*, 134 S. Ct. at 1248.

To that end, Section 924(c) provides that "any person who" violates its distinct criminal prohibition "shall, *in addition to the punishment* provided for [the predicate] crime of violence or drug trafficking crime," be "sentenced to a term of imprisonment of not less than 5 years" and, "[i]n the case of a second or subsequent conviction under [Section 924(c)]," to "a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(A)(i) and (C)(i) (emphasis added); see *Deal* v. *United States*, 508 U.S. 129, 131-136 (1993). Congress, moreover, went beyond imposing that new and "addition[al]" punishment. Section 924(c) further provides that "[n]otwithstanding any other provision of law," "no term of imprisonment imposed on a person under [Section 924(c)] shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the [predicate offense]." 18 U.S.C. 924(c)(1)(D)(ii).[1]

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[1] Congress also enacted enhanced versions of the firearms offense for even more dangerous methods of use and types of firearms. Section 924(c)'s mandatory-minimum prison term accordingly increases when a firearm is "brandished" (seven years) or

2. Those provisions demonstrate that a term of imprisonment imposed for Section 924(c)'s "combination" crime must be added to the term of imprisonment for a predicate offense that is appropriate for the defendant's conduct underlying that offense.

a. First, by requiring that "a term of imprisonment" for a Section 924(c) offense "shall" be imposed "*in addition to* the punishment provided for [the predicate offense]," 18 U.S.C. 924(c)(1)(A) (emphasis added), Congress instructed that a prison term for the firearms offense must be imposed "over and above" the punishment for that predicate. *Webster's Third New International Dictionary* 24 (1971) (defining "in addition to"). That direction does not merely instruct a sentencing judge to impose a separate sentence. A judge must always impose such a sentence for each separate count of conviction. Nor does the "in addition to" direction mean that imprisonment for the firearms offense must run consecutively to a term of imprisonment for the predicate offense. Because Congress separately "mandat[ed] consecutive sentences" in Section 924(c)(1)(D)(ii), see *Gonzales*, 520 U.S. at 6, giving the same consecutive-sentence reading to Section 924(c)'s distinct "in addition to" phrase would impermissibly render the latter superfluous.

"discharged" (ten years), see 18 U.S.C. 924(c)(1)(A)(ii) and (iii); when the firearm possessed is "a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon" (ten years) or "a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler" (30 years), 18 U.S.C. 924(c)(1)(B)(i) and (ii); and when the offense that constitutes "a second or subsequent [Section 924(c)] conviction" involves a machinegun, destructive device, silencer, or muffler (life imprisonment), 18 U.S.C. 924(c)(1)(C)(ii). Petitioner was not convicted of any such enhanced offense.

See *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (discussing the "most basic interpretive canon[]" that no part of a statute should be rendered "inoperative or superfluous") (citation omitted). Section 924(c)(1)(A) therefore must require more: It requires that the term of imprisonment for Section 924(c) be "over and above" an appropriate punishment for the predicate offense conduct.

That is the whole point of Section 924(c)'s distinctive "combination" offense. Section 924(c) specifically targets the "extreme risk of harm," *Rosemond*, 134 S. Ct. at 1248, inherent when a defendant commits a federal predicate offense that itself can *already* "be prosecuted in a court of the United States," 18 U.S.C. 924(c)(1)(A), while using, carrying, or possessing a firearm. Section 924(c) can therefore apply only when the government proves beyond a reasonable doubt that the defendant has committed the (separate) predicate offense. *Rosemond*, 134 S. Ct. at 1245, 1247. And if the government can prove that predicate offense in federal court, it can already obtain a separate federal conviction and sentence of imprisonment for that separate statutory offense.

The "punishment provided for such [a predicate] crime of violence or drug trafficking crime," 18 U.S.C. 924(c)(1)(A), in the absence of a Section 924(c) conviction—*i.e.*, the punishment that the government could already obtain under federal law *without* a Section 924(c) conviction—is therefore the logical baseline upon which Congress sought to impose the additional gun-targeting sanction in Section 924(c). Indeed, if Section 924(c) is to have practical force beyond the pre-existing statutory predicate offense on which it is built, it must provide its additional punishment be-

yond the "punishment provided for [the predicate offense]," *ibid.* That is why, as this Court has explained, "§ 924(c)'s longstanding thrust" has been "its insistence that sentencing judges impose additional punishment for § 924(c) violations," a "command[] that [ensures that] all § 924(c) offenders shall receive additional punishment for their violation of that provision." *Abbott*, 562 U.S. at 20, 25 (emphasis omitted). And Congress has itself specified the "addition[al]" punishment that "shall" be imposed: at least five years for a first Section 924(c) offense and at least 25 years for second or subsequent offenses. 18 U.S.C. 924(c)(1)(A)(i) and (C)(i).

Congress's 1984 amendment to Section 924(c) reinforces that conclusion. Before that amendment, this Court had held that Section 924(c) did not apply at all when the federal offense that would serve as its predicate "is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used." *Busic* v. *United States*, 446 U.S. 398, 399-400 (1980); see *Simpson* v. *United States*, 435 U.S. 6, 7, 16 (1978) (holding that a sentencing court cannot apply both a statutory weapons enhancement for the predicate offense and a sentence for violating Section 924(c)). Congress "repudiated" that result in 1984 by making clear that Section 924(c) applies even when "the underlying [predicate-offense] statute" itself "'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'" *Gonzales*, 520 U.S. at 10 (quoting amendment now codified at 18 U.S.C. 924(c)(1)(A)). As amended, therefore, Section 924(c) applies and requires an "addition[al]" prison term, even when the predicate-offense statute on

which Section 924(c)'s "combination" crime rests itself includes a weapons-based sentencing enhancement.[2]

b. Congress's related direction "mandating [a] consecutive sentence[]" for a Section 924(c) conviction, *Gonzales*, 520 U.S. at 6, reinforces the point. Section 924(c)(1)(D)(ii) provides that "no term of imprisonment imposed on a person under [Section 924(c)] shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the [predicate offense]." 18 U.S.C. 924(c)(1)(D)(ii). As a result, the total length of an offender's imprisonment must be increased by the entire term of the mandatory-minimum sentence imposed under Section 924(c). That consequence of the consecutive-sentencing requirement would often be thwarted if, as petitioner contends (Br. 24), a sentencing court may reduce the underlying term of imprisonment for the predicate offense to just "one day" in order to offset the "addition[al]" punishment that must be imposed for the firearms offense.

Take, for example, a defendant who uses a firearm to assault and intimidate a federal employee on account of his official duties in violation of 18 U.S.C. 111(a) and (b). Cf. *Busic*, 446 U.S. at 400-401 (ad-

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[2] Section 924(c) additionally prohibits a sentencing judge from imposing a term of probation for the predicate offense. Probation is generally an authorized type of sentence for a federal offense that may be imposed as an alternative to imprisonment. See 18 U.S.C. 3551(b)(1), 3561-3566; see also S. Rep. No. 225, 98th Cong., 1st Sess. 90 (1983). But Section 924(c) provides that "[n]otwithstanding any other provision of law," "a court shall not place on probation any *person* convicted of a violation of [Section 924(c)]." 18 U.S.C. 924(c)(1)(D)(i) (emphasis added); cf. *Deal*, 508 U.S. at 132 (holding that "conviction" in Section 924(c) "refers to the finding of guilt" before sentencing).

dressing similar Section 111 offense). That provision permits a prison sentence of up to 20 years. 18 U.S.C. 111(b). If the sentencing court determines that a five-year sentence for Section 111's enhanced firearms-use offense is the appropriate one in light of the particular firearms use, the court would also presumably conclude that a total, aggregate sentence of five years is all that would be necessary notwithstanding the additional Section 924(c) conviction, because the court has already accounted fully for the firearm in arriving at its calculation of a five-year sentence. Cf. *ibid.* (enhanced penalty for firearm use); Sentencing Guidelines §§ 2A2.2, 2A2.4(c)(1) & Ch. 5, Pt. A (relevant provisions). Under petitioner's view, the judge should then impose a one-day sentence for the Section 111 offense and a five-year mandatory consecutive sentence under Section 924(c), to produce a total, aggregate sentence of just five years and one day.

Such a reduction in the term of imprisonment for the predicate offense *because* of Section 924(c)'s mandatory-minimum sentence would effectively negate Section 924(c)'s consecutive-sentence requirement. Congress would not have enacted Section 924(c)'s combination offense to provide "additional" and consecutive punishment beyond the predicate offense, merely to obtain just one day of additional imprisonment. Approving that outcome would effectively "carve out statutory exceptions [from Section 924(c)] based on judicial perceptions of good sentencing policy." *Gonzales*, 520 U.S. at 10. And it would do so in the precise context in which Congress amended Section 924(c) to augment the punishment that can be imposed on a Section 111 offender who uses a gun. See *ibid.* (Congress's 1984 amendment to Section

924(c) "repudiated" *Busic*, which rejected Section 924(c)'s application in this context). Indeed, "after *Busic*, § 924(c) *demands* a discrete punishment even if the predicate crime itself 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'" *Abbott*, 562 U.S. at 25 (emphasis added; citation omitted). And given Congress's "command[] that all § 924(c) offenders shall receive additional punishment for their violation of that provision," it is "implausible" that Congress would have authorized such a loophole "severely limiting application of th[at] instruction." *Id.* at 20, 25.

B. The Sentencing Reform Act's Provisions Confirm That A District Court May Not Reduce The Term Of Imprisonment For A Predicate Offense Merely To Offset The Length Of A Prison Term Under Section 924(c)

The sentencing provisions of the Sentencing Reform Act confirm that understanding. The Comprehensive Crime Control Act of 1984 (CCC Act), Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, both amended Section 924(c), see *id.* § 1005(a), 98 Stat. 2138, and significantly revised federal sentencing law by enacting the Sentencing Reform Act, see *id.* Tit. II, Ch. II, 98 Stat. 1987 (enacting 18 U.S.C. 3551 *et seq.*). The Sentencing Reform Act, in turn, establishes distinct procedures governing how sentencing courts should determine (1) the appropriate sentence of imprisonment for each individual offense for which a defendant is convicted, 18 U.S.C. 3582(a), and (2) the aggregate sentence when a defendant is convicted of multiple criminal offenses, 18 U.S.C. 3584. As a result, "if a defendant is convicted of a number of offenses," the Act is designed so that "the sentences for each of the multiple offenses [should] be determined separately and the

degree to which they should overlap [should then] be specified." S. Rep. No. 225, 98th Cong., 1st Sess. 176-177 (1983) (*1983 Senate Report*). Section 924(c) eliminates a sentencing court's normal authority in the latter process under Section 3584 to determine the total, aggregate length of imprisonment from multiple terms of imprisonment. That withdrawal of authority demonstrates that such a court many not exercise control over the total length of imprisonment by reducing the sentence on the predicate offense to offset the effect of Section 924(c)'s mandatory-minimum prison term.

1. Each count of conviction carries its own sentence the length of which is determined by evaluating the Section 3553(a) factors

The Sentencing Reform Act provides that the sentence for each individual offense must be determined in light of the factors in Section 3553(a). Under Section 3553(a), a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [Section 3553(a)(2)]," 18 U.S.C. 3553(a), "to the extent that [those purposes] are applicable," 18 U.S.C. 3551(a). See *Tapia* v. *United States*, 564 U.S. 319, 325 (2011). The "four considerations [embodied in Section 3553(a)(2)]—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally." *Ibid.* And those general purposes of sentencing jointly reflect one of "the seven sentencing factors [enumerated in Section 3553(a)(1) to (7)] that courts must consider in imposing sentence." *Pepper* v. *United States*, 562 U.S. 476, 504 (2011) (rejecting argument that would "elevate two § 3553(a) factors

above all others"); see *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007).

Congress's description of the Section 3553(a) factors reflects the practice of separately imposing an appropriate sentence for each offense for which a defendant has been convicted. The first two factors that a sentencing judge must consider before imposing a "particular sentence" include "the nature and circumstances of *the* offense" in question, 18 U.S.C. 3553(a)(1) (emphasis added), and "the need for the sentence imposed" "to reflect the seriousness of *the* offense" and "to provide just punishment for *the* offense," 18 U.S.C. 3553(a)(2) (emphasis added). The sentence for such "an offense" generally may include a term of probation (under Sections 3561-3566), a fine (under Sections 3571-3574), and a term of imprisonment (under Sections 3581-3586). 18 U.S.C. 3551(a). The provisions governing those distinct components likewise specify that each may be imposed as part of a sentence when it is statutorily authorized for "the offense" or the category of offenses of which the particular offense is a part. See, *e.g.*, 18 U.S.C. 3561(a)(2), 3571(b)(1), 3581(b).

Within that framework, Congress directed that a sentencing judge shall consider "the factors set forth in [S]ection 3553(a)" when evaluating the length, amount, or other characteristics of each component of the sentence. 18 U.S.C. 3562(a) (probation), 3572(a) (fine), 3582(a) (imprisonment). Absent a mandatory sentence, therefore, the "length of the term [of imprisonment]" that a court must determine under Section 3582(a) requires focusing on whether the selected term of imprisonment is sufficient to punish "the offense" adequately. 18 U.S.C. 3553(a)(1) and (2); see 18 U.S.C. 3582(a).

2. *The total length of imprisonment resulting from multiple terms of imprisonment is determined under Section 3584 using the Section 3553(a) factors*

Once "the sentences for each of the multiple offenses [have been] determined separately," *1983 Senate Report* 176-177, other provisions of the Sentencing Reform Act govern the total length of imprisonment that results from aggregating the individual terms of imprisonment. That additional step is necessary because, although the term of imprisonment for each individual offense should "reflect the seriousness of the offense" in question and "provide just punishment for th[at particular] offense," 18 U.S.C. 3553(a)(2), determining the lengths of such multiple terms of imprisonment does not necessarily resolve the additional question of what total punishment is appropriate for the defendant who is convicted of multiple offenses with prison terms. A judge who sentences a defendant to five years for one offense and two years for another, for instance, would logically conclude that the defendant should be punished with at least five years of imprisonment because that is the term the judge imposed for one offense standing alone. But that conclusion does not address whether a five-year term is all that is necessary or whether a greater aggregate punishment is warranted in light of all of the circumstances.

Congress specifically addressed such considerations by enacting Section 3584. Section 3584 thus "provides the rules for determining the length of a term of imprisonment for a person convicted of more than one offense," *1983 Senate Report* 125-126, by "grant[ing] sentencing judges broad authority to 'run' multiple sentences either 'concurrently or consecu-

tively,'" *United States* v. *LaBonte*, 520 U.S. 751, 769 (1997). The statute reflects the general and "traditional[]" rule that sentencing judges possess "discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences." *Setser* v. *United States*, 132 S. Ct. 1463, 1468 (2012) (citing *Oregon* v. *Ice*, 555 U.S. 160, 168-169 (2009)).

As a result, Section 3584 confers discretion to determine the overall length of imprisonment appropriate for a defendant convicted of multiple crimes. Once the appropriate length of each individual term of imprisonment for each count of conviction has been determined, the judge's additional determination under Section 3584 specifying whether those terms are to be "fully consecutive," partially "overlapping," or fully "concurrent," see *1983 Senate Report* 127, 165, will yield the total, aggregate length of imprisonment for all the offenses. The "[m]ultiple terms of imprisonment ordered to run consecutively or concurrently" under Section 3584 are then "treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. 3584(c). Cf., *e.g.*, 18 U.S.C. 3624 (governing timing of prisoner's release).

Section 3584 "grants sentencing judges" such discretionary authority, *LaBonte*, 520 U.S. at 769, by providing that when "multiple terms of imprisonment are imposed on a defendant," they "may" (with one exception not relevant here) be ordered to "run concurrently or consecutively." 18 U.S.C. 3584(a); see *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016) (The "word 'may' clearly connotes discretion.") (citation omitted). Section 3584 further provides that the judge, "in determining whether" to

order the separate prison terms "to run concurrently or consecutively, *shall consider*, as to *each offense* for which a term of imprisonment is being imposed, the *factors set forth in section 3553(a)*." 18 U.S.C. 3584(b) (emphasis added). That instruction to set the overall length of imprisonment through consecutive and concurrent sentencing determinations after reevaluating "the nature and circumstances of the offenses" (plural), "the history and characteristics of the offender," and the other Section 3553(a) factors applicable to each offense "simply serves to call attention to the fact that in this sentencing determination [under Section 3584], the principal focus should be upon the purposes to be served by the sentence, and that the sentence should be structured accordingly." *1983 Senate Report* 128.

3. Section 924(c) withdraws a judge's discretionary authority to set the total length of imprisonment under Section 3584

a. Section 924(c), however, significantly alters the application of that statutory sentencing framework. Although the sentencing court is still required to determine the "length of the term" of imprisonment for each offense (see 18 U.S.C. 3582(a)) such that the term of imprisonment on each individual count is "sufficient" to "reflect the seriousness of" and to "provide just punishment for the [particular] offense" at issue, 18 U.S.C. 3553(a) and (a)(2)(A), Congress partially displaced the court's authority under Section 3584(b) by eliminating its ability to determine the total, *aggregate* sentence to reflect a length that the court concludes is "sufficient, but not greater than necessary" (18 U.S.C. 3553(a)), to advance the objectives listed in Section 3553(a). Congress did so in Section

924(c) by prohibiting the sentencing court from making any term of imprisonment imposed under Section 924(c) "run concurrently with any other term of imprisonment." 18 U.S.C. 924(c)(1)(D)(ii). That requirement that a term of imprisonment for each Section 924(c) offense "run consecutively to all other prison terms" specifically "cabin[s] the sentencing discretion of district courts" in this context. *Gonzales*, 520 U.S. at 9-10.[3]

That withdrawal of a sentencing judge's discretionary authority under Section 3584 to determine the *total* length of imprisonment for multiple prison terms also necessarily displaces Section 3584's associated requirement that the judge consider "the factors set forth in section 3553(a)," 18 U.S.C. 3584(b), before exercising the (withdrawn) discretion to set the total length. Although the judge may still determine whether terms of imprisonment for non-Section 924(c) offenses run concurrently or consecutively to each other, Section 924(c) wholly displaces the judge's ability to determine the total length of imprisonment by placing the additional firearms sentence beyond the judge's discretionary control. See Sentencing Guidelines § 5G1.2(a) & comment. (n.2(A)) (sentence for Section 924(c) offense "shall be * * * imposed independently").

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[3] Section 3584 by its own terms recognizes the superseding force of statutes like Section 924(c). 18 U.S.C. 3584(a) ("Multiple terms of imprisonment imposed at the same time [will] run concurrently *unless* the court orders or *the statute* mandates that the terms are to run consecutively.") (emphasis added). The drafters of the Sentencing Reform Act likewise identified "18 U.S.C. 924(c)" as a statute that displaces the discretionary decision normally governed by Section 3584. See *1983 Senate Report* 127 & n.313.

b. Petitioner agrees (Br. 23) that Section 924(c) "overrides a sentencing judge's usual discretion under § 3584(b) to order concurrent rather than consecutive sentences." But petitioner insists (Br. 14) that notwithstanding that withdrawal of discretion, the judge "cannot 'impose a sentence sufficient, but not greater than necessary' [under Section 3553(a)] without taking into account how long the total sentence will actually be." Petitioner argues, for instance, that the judge must apply Section 3553(a)'s parsimony principle to decide how much total prison time is needed, for instance, to "adequately protect the public from th[e] defendant" and provide "'just punishment for the offense.'" Br. 15-16 (quoting 18 U.S.C. 3553(a)). Petitioner further asserts (Br. 17) that "[t]his case perfectly illustrates these problems." Those contentions lack merit.

First, petitioner's invocation of the Section 3553(a) factors is misplaced. Those factors are normally relevant in determining the total length of imprisonment for multiple offenses. See 18 U.S.C. 3584(b). But, as explained above, Congress through Section 924(c) has withdrawn the sentencing judge's authority under Section 3584 to determine that total, aggregate length based on the judge's consideration of the Section 3553(a) factors. See pp. 24-27, *supra*.

Petitioner relatedly observes (Br. 17), that the district court stated that, in its view, the two consecutive Section 924(c) sentences totaling 30 years of imprisonment in this case were "not just sufficient," they were "*more than* sufficient" based on the judge's own assessment of the Section 3553(a) factors. J.A. 26 (emphasis added). But Congress in Section 924(c) has *itself* determined that such sentences not only are

appropriate but that they cannot run concurrently with any other sentence. And just as a sentencing judge cannot properly invoke Section 3553(a)'s principles to impose a sentence below a statutory minimum when the judge deems that minimum "more than sufficient," a judge cannot displace Congress's determination that such a Section 924(c) sentence must be "in addition to the punishment provided for [any predicate offenses]," 18 U.S.C. 924(c)(1)(A).

In contending otherwise, petitioner disregards the process for determining the sentence for each *separate* term of imprisonment for his non-Section 924(c) counts of conviction. See pp. 22-23, *supra* (discussing that process). Where, as here, the sentencing judge would impose a 40-month term of imprisonment for each such offense if the judge did not consider the length of Section 924(c)'s mandatory-minimum term, J.A. 26, a one-day sentence could not properly reflect the relevant Section 3553(a) factors. A sentence of one day for such a non-Section 924(c) felony offense would not itself reflect "the need for the sentence imposed" "to reflect the seriousness of *the* offense" at issue and "to provide just punishment for *th[at]* offense," 18 U.S.C. 3553(a)(2) (emphasis added). See J.A. 20, 23 (expressing doubt that any "judge in the country" would grant such "an extraordinary variance").

C. Section 924(c)'s Drafting History Reflects Congress's Intent To Withdraw Discretionary Sentencing Authority To Effectively Eliminate Section 924(c)'s Additional Punishment

Section 924(c)'s drafting history from 1971 onward reflects Congress's longstanding goal of curtailing sentencing discretion in order to ensure that Section

924(c) will impose an undiminished incremental prison term prescribed by statute. The 1984 amendments in particular demonstrate that, at the same time that Congress redesigned the federal sentencing framework in the Sentencing Reform Act, it took care to displace every sentencing process—concurrent sentencing, suspension of imprisonment, probation, and parole—that might potentially stand as a barrier to that objective.

1. a. In 1968, when Congress enacted Section 924(c), the provision lacked the stringent sentencing provisions contained in present law. See Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1223-1224. That original statute provided, in pertinent part, that whoever uses or carries a firearm in connection with a predicate felony offense "shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years" and, "[i]n the case of his second or subsequent conviction under [Section 924(c)], such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years." 18 U.S.C. 924(c) (Supp. IV 1968).

b. Congress promptly amended Section 924(c) to strengthen its sentencing provisions. In February 1969, Senator Mansfield introduced a bill containing the text that Congress later enacted in January 1971 as an amendment to Section 924(c) (with a minor change not relevant here). See 115 Cong. Rec. 2567-2568 (1969).[4] The Senator repeatedly explained that

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[4] The Senate passed Senator Mansfield's bill (S. 849), see 115 Cong. Rec. at 34,838-34,840, before it inserted the bill's text as an amendment to the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 13, 84 Stat. 1889 (enacted Jan. 2, 1971). See 116

his amendment would require "a mandatory additional prison sentence for criminals who choose to resort to firearms" by "compel[ing] [those criminals] to *serve additional time in prison solely* for deciding to use a firearm." *Id.* at 2567 (emphasis added); see also, *e.g.*, *id.* at 34,838 (explaining that the "sentence imposed * * * would be in addition to the sentence for the [predicate] crime itself" to "penalize[] [the criminal] solely for choosing to use or carry a gun"); *Firearms Legislation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 17-18 (1969) (*1969 Senate Hearings*) (testifying that the "mandatory" sentence imposed "solely for [the criminal's] choice to use a gun" was designed to be "so severe as to deter his use of this deadly weapon"). The bill sought to achieve that objective in two ways: It amended Section 924(c) to provide that, first, the prison sentence for a Section 924(c) offense shall be "in addition to the punishment provided for the commission of [the predicate offense]"; and, second, "notwithstanding any other provision of law," a sentencing court could not (at least in the context of a second or subsequent conviction) run Section 924(c)'s prison term "concurrently" with the prison term for the predicate offense. See 115 Cong. Rec. at 2568 (reproducing bill); cf. 18 U.S.C. 924(c) (Supp. IV 1968) (original statute).

Senator Mansfield recognized that requiring Section 924(c)'s prison term to be imposed "in addition to the punishment" for the predicate offense would not itself ensure that sufficient punishment would be imposed upon repeat Section 924(c) offenders. His

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Cong. Rec. 35,734, 42,150 (1970); see also H.R. Conf. Rep. No. 1768, 91st Cong., 2d Sess. 20-21 (1970).

amendment thus also required the imposition of a consecutive term of imprisonment under which "there [would be] no way [to avoid] this additional sentence" because "no discretion [was] given" to the sentencing judge. 116 Cong. Rec. 42,150 (1970) (statement of Sen. McClellan in colloquy with Sen. Mansfield); see *1969 Senate Hearings* 19 (statement of Sen. Dodd) (observing that the amendment would "strip[] the judiciary of a very important power of [sentencing] judgment"); *ibid.* (statement of Sen. Mansfield) (agreeing and stating that "some of the discretion which we give to the judiciary should be stripped").

c. In the years leading up to 1984, Congress concluded that yet further amendments were necessary to close gaps in Section 924(c)'s sentencing provisions.

Courts had determined, for instance, that although the then-existing statute was "ambiguous on the subject," a consecutive sentence had "not [been made] mandatory" for a first Section 924(c) offense. *United States* v. *Gerard*, 491 F.2d 1300, 1306 n.5 (9th Cir. 1974); see *United States* v. *Gaines*, 594 F.2d 541, 545-546 & n.7 (6th Cir.), cert. denied, 442 U.S. 944 (1979). Attorney General William French Smith thus testified that he had "adopted [a] far-reaching proposal" and would "strongly support" a statutory fix for the aforementioned "ambigu[ity]" and other flaws in "draft-[manship]" that allowed a person convicted under Section 924(c) to "be given a suspended sentence or be placed on probation for his first violation." *Report of the Attorney General's Task Force on Violent Crime: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 9, 17 (1981) (*1981 House Hearings*); see also *1983 Senate Report* 312 & n.2 (identifying these "drafting prob-

lems"). Those amendments to further "tie the hands of judges" were opposed by the American Bar Association, see *1981 House Hearings* 205, and, later, by the Judicial Conference of the United States on the ground that they would magnify "the degree of inflexibility" in sentencing. See *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 656 (1983) (*1983 Senate Hearings*).

The Senate passed a bill (S. 2572) in 1982 that would have revised Section 924(c) to fix these perceived "flaws" and "eliminate[] the discretionary elements of the existing law," which rendered Section 924(c) "ineffective." 128 Cong. Rec. 26,531 (1982) (statement of Sen. Levin); *id.* at 26,533 (statement of Sen. Thurmond) (supporting amendment to "eliminat[e] loopholes now used to evade mandatory minimum prison terms."); see *id.* at 26,581 (passage), 26,610-26,611 (revision to Section 924(c)). The House of Representatives, however, failed to act on the legislation before the 97th Congress came to an end. See *Comprehensive Crime Crime Control Act of 1983: Message from the President of the United States*, H. Doc. No. 32, 98th Cong., 1st Sess. 1 (1983) (*President's Message*).

In early 1983, President Reagan transmitted an Administration-drafted bill building upon the legislation that had stalled in the prior Congress. *President's Message* 1. Among the proposed provisions that the President deemed "important in rolling back the tide of criminal activity that threaten[ed] our Nation," *ibid.*, was the amendment to Section 924(c) that Congress later enacted in 1984 without modifica-

tion. Compare *id.* at 320-321 (text) with CCC Act § 1005(a), 98 Stat. 2138 (18 U.S.C. 924(c) (Supp. II 1984)).[5] In addition to solving the same drafting deficiencies in Section 924(c) that S. 2572 had targeted, the 1984 amendment included language specifically designed to repudiate the Court's decisions in *Busic* and *Simpson* by clarifying that Section 924(c) will apply and require the imposition of an additional term of imprisonment even when the predicate offense has its own statutory weapons enhancement. See *1983 Senate Hearings* 199 (formal statement of Department of Justice); *1983 Senate Report* 312 & nn.3-4 (similar); see also *Gonzales*, 520 U.S. at 10; see pp. 18-19, *supra* (discussing amendment).

The 1984 amendments to Section 924(c) thus significantly enhanced the statute's sentencing provisions by curtailing discretionary sentencing authority in three important ways. First, as amended, Section 924(c) required every term of imprisonment for its firearms offense to run consecutively to the prison sentences imposed for the predicate offense and (for the first time) for "any other term of imprisonment."[6]

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[5] The relevant portions of the Administration's bill (S. 829) were incorporated into a clean bill (S. 1762) reported by the Senate Judiciary Committee, *1983 Senate Report* 1-2 & n.9, 37, that the Senate passed. 130 Cong. Rec. 1587 (1984). Most of the provisions of S. 1762, including the bill's amendment to Section 924(c) and its chapter establishing the Sentencing Reform Act, were subsequently incorporated into an omnibus joint budget resolution (H.J. Res. 648) that Congress enacted into law. See CCC Act, Ch. II, 98 Stat. 1987 (Sentencing Reform Act); *id.* § 1005(a), 98 Stat. 2138 (amending Section 924(c)).

[6] See 18 U.S.C. 924(c) (Supp. II 1984) ("Notwithstanding any other provision of law, * * * the term of imprisonment imposed under this subsection [shall not] run concurrently with any other

Second, the statute eliminated a sentencing judge's discretion to suspend any term of imprisonment and place on probation a person convicted of a Section 924(c) offense, cf. 18 U.S.C. 3651 (1982) (repeal effective 1987) (authorizing suspension of sentence), as well as the authority of the United States Parole Commission to parole any such individual who had served at least one-third of his prison term, cf. 18 U.S.C. 4205(a) (1982) (repeal effective 1987) (governing parole).[7] Third, the statute required fixed, mandatory five- and ten-year prison sentences for first and repeat Section

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term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried.").

[7] See 18 U.S.C. 924(c) (Supp. II 1984) ("Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection * * * . No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.).

In the same 1984 Act that amended Section 924(c), Congress repealed the underlying statutory authority for suspending sentences and granting post-sentencing parole. See Sentencing Reform Act §§ 212(a)(2), 218(a)(5), 98 Stat. 1987, 2027 (repealing Chapters 231 and 311 of Title 18, U.S. Code, which had included 18 U.S.C. 3651 and 4205 (1982)). But because the effective date of that repeal was delayed until November 1, 1987, *id.* § 235(a)(1), 98 Stat. 2031; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728; see *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 400 & n.4 (1991), Section 924(c)'s prohibition against suspended sentences and parole remained in force until 1987, when the then-new Sentencing Guidelines framework took effect. Congress subsequently amended Section 924(c) to remove the now-obsolete references to suspending sentence and parole, but Section 924(c) retains its consecutive-sentencing requirement and its prohibition on probation, see 18 U.S.C. 924(c)(1)(D), both of which remain important under the current sentencing framework. See 18 U.S.C. 3561, 3584(a) and (b).

924(c) offenders, thereby eliminating a judge's sentencing discretion to select a prison term from the prior one-to-ten- and two-to-25-year statutory ranges. Compare 18 U.S.C. 924(c) (Supp. II 1984) with 18 U.S.C. 924(c) (1982). Those changes accordingly perfected Senator Mansfield's original vision that Section 924(c)'s mandatory prison sentence would "compel [criminals] to serve additional time in prison solely for deciding to use a firearm," 115 Cong. Rec. at 2567, with "no way" to "avoid[]" that "separate and additional sentence" because "no discretion [had been] given" to reduce it, 116 Cong. Rec. at 42,150.

d. The salient sentencing provisions of Section 924(c) that took form in 1984 continue to exist in current law. And "[b]etween 1984 and 1998, Congress [repeatedly] expanded the reach or increased the severity of § 924(c) on four [separate] occasions," with the 1998 revision ultimately converting "what were once mandatory sentences [of specified durations] into [the] mandatory minimum sentences" now present in the statute. *Abbott*, 562 U.S. at 17, 23-24 & n.6 (citation omitted).

2. Petitioner's description of Section 924(c)'s evolution largely focuses on the debates surrounding the 1968 enactment of the statute. See Br. 28-30. Those debates, however, shed no light on Congress's enactment and subsequent enhancement of the sentencing provisions at issue here, which were first adopted in January 1971 with Senator Mansfield's amendments. See pp. 30-36, *supra*. Petitioner addresses the relevant decades of history in a paragraph and concludes that Congress's "consistent background assumption" in Section 924(c) has been one "of judicial discretion * * * as to the length of the sentence for the underly-

ing conviction." Br. 30. That assertion cannot be squared with the overwhelming record of Congress's intentional restriction of sentencing discretion in this context. See pp. 30-36, *supra*.

Petitioner declares, for instance, that "Congress [has] said nothing in § 924(c) about the nature or extent of 'the punishment provided for the underlying [predicate offense]'" and that the government's failure to recognize this point is a "fundamental error[]." Br. 25-26 (brackets and citation omitted). By 1984, however, Congress had prohibited a sentencing judge from, for instance, "plac[ing] on probation or suspend[ing] the sentence of *any person* convicted of a violation of [Section 924(c)]," not just a sentence "*imposed* under [Section 924(c)]." 18 U.S.C. 924(c) (Supp. II 1984) (emphasis added). That prohibition barred probation and the suspension of a predicate-offense sentence. Section 924(c) similarly continues to bar probation today. See 18 U.S.C. 924(c)(1)(D)(i); see also p. 19 n.2, *supra*; cf. p. 35 & n.7 (authority to suspend sentences was repealed in 1987).

Moreover, Congress regulated the appropriate punishment for the underlying predicate offense through its enactment of the Sentencing Reform Act. Central to that effort was the creation of sentencing procedures that separated (1) a court's determination of the individual terms of imprisonment for each count of conviction based on factors relevant to *each such offense* from (2) the court's additional discretionary determination under Section 3584 setting the total, aggregate length of imprisonment produced by multiple prison terms through concurrent and consecutive sentencing determinations. See pp. 21-27, *supra*. Section 924(c)'s withdrawal of the latter authority

thus ensured that the statute would compel violators to "serve additional time in prison" to the full extent specified in Section 924(c) "solely for deciding to use a firearm." See 115 Cong. Rec. at 2567. Simply put, the statute's "longstanding thrust" has been its "insistence that sentencing judges impose *additional* punishment for § 924(c) violations." *Abbott*, 562 U.S. at 20. Petitioner's belief that "Congress adopted a less aggressive mode of applying § 924(c)" is "implausible." *Ibid.*

D. Petitioner's Understanding Of Section 924(c)'s Sentencing Provisions Is Incorrect, Produces Anomalous Sentencing Results, And Serves No Legitimate Sentencing Function

1. Petitioner ultimately argues (Br. 26-27) that "Congress's purpose" in Section 924(c) was merely to "create a floor (by imposing mandatory minimums) below which a defendant's total sentence may not drop," thus ensuring that the defendant will always be incarcerated for the period specified in Section 924(c) for the firearms offense. That argument does not reflect a realistic understanding of Section 924(c).

If Congress had intended to create a "floor," it would have simply drafted Section 924(c) to impose a mandatory-minimum term of imprisonment (*e.g.*, no less than five years, 18 U.S.C. 924(c)(1)(A)(i)). Imposing a single minimum term of imprisonment itself ensures that the defendant will be incarcerated for the length of that term, even when the term is not imposed "in addition" or consecutively to another term of imprisonment. This Court has therefore rejected the contention that Section 924(c) reflects "a modest scheme designed simply to ensure that all § 924(c) offenders 'serve at least [the statute's mandatory-

minimum] 5 years in prison.'" *Abbott*, 562 U.S. at 20 (citation omitted). "If Congress wanted to ensure that § 924(c) offenders 'receive at least five years in prison,'" the Court explained, "there was an obvious solution: Congress could have excised all prescriptions ordering that § 924(c) sentences shall run consecutively to other sentences" and rested on the bare imposition of a mandatory-minimum sentence. *Id.* at 24 (citation omitted).

2. Petitioner's position, if adopted, would result in anomalous sentencing outcomes.

Take, for instance, two co-defendants in a Hobbs Act robbery with equivalent criminal histories, both of whom possessed a gun but engaged in significantly different offense conduct. If the sentencing judge were to determine based on the Section 3553(a) factors that a two-year overall sentence was sufficient for the minor player but that a five-year sentence was appropriate for the leader, the judge should, under petitioner's view, impose on both defendants the mandatory-minimum five-year term of imprisonment for the Section 924(c) offense and add a one-day sentence for the predicate offense, yielding an aggregate five-year-and-one-day sentence for both. With such sentences, however, the "additional punishment" for the Section 924(c) offense would produce an aggregate sentence only one day longer than the five-year sentence that the more serious offender would have obtained without the Section 924(c) conviction. By contrast, the "additional punishment" for the less culpable offender would increase his aggregate sentence by more than three years.

Both "additional punishments" not only are significantly less than the five years of "additional" punish-

ment mandated by Section 924(c), see 18 U.S.C. 924(c)(1)(A)(i), they perversely sanction the less culpable defendant much more severely for the firearms offense and let the more serious offender get off with only a nominal, one-day increase. Congress would not have countenanced such anomalous outcomes. Those anomalies are entirely eliminated if a judge imposes Section 924(c)'s mandatory-minimum sentence "in addition to the punishment" appropriate for the predicate offense.

3. Significantly, the *only* apparent function of petitioner's proposed sentencing regime appears to be to skirt congressionally imposed mandatory-minimum sentences that must be imposed both "in addition" and consecutively to the punishment for other crimes. Outside the context of a statute requiring a mandatory and consecutive sentence, a sentencing judge would never have occasion to impose the type of reduced-to-one-day sentence that petitioner advocates. If the judge, for instance, determines that two offenses committed by a defendant warrant terms of imprisonment of five and two years respectively when they are considered separately, the judge has determined that the defendant should be incarcerated for at least five years. If the judge further determines that no more punishment is necessary, the judge may make both terms of imprisonment run concurrently under Section 3584. That process ensures that each of the two terms of imprisonment appropriately "reflect[s] the seriousness of the offense" for which it was imposed and "provide[s] just punishment for th[at] offense," 18 U.S.C. 3553(a)(2).

Petitioner's approach frustrates Section 924(c) by allowing a judge to achieve the same result in a Sec-

tion 924(c) case by reducing the predicate-offense sentence to a single day. Petitioner has not identified, and the government is not aware of, any federal or historical practice of imposing a term of imprisonment of just one day for one of multiple offenses where the judge has concluded that the offense by itself would warrant longer time. No reason exists for such an odd practice, because the historical discretion of a judge to impose concurrent and consecutive sentences has traditionally allowed the judge to control the total term of imprisonment. Here, however, Congress specifically withdrew that discretion embodied in Section 3584 in this firearms context. As such, petitioner's proposed sentencing regime would simply serve to circumvent Congress's decision to strip judges of sentencing discretion to control the total length of imprisonment without serving any permissible sentencing function.

E. The Sentencing Guidelines Reflect A Permissible Method Of Sentencing In This Section 924(c) Context

The Sentencing Commission has adopted a framework that incorporates Section 924(c) with its general provisions. That framework reinforces the conclusion that a reduction to a one-day sentence on the predicate offense is not appropriate.

1. Because the sentence of imprisonment for each offense must be based on the "circumstances of th[at] offense," 18 U.S.C. 3553(a)(1), which often shares common offense conduct with other offenses, the Sentencing Guidelines generally require a sentencing judge to evaluate as a group all closely related counts and then to determine an overall offense level for the related offense conduct. See Sentencing Guidelines §§ 3D1.1(a)(1)-(2), 3D1.2, 3D1.3. After a combined

offense level has been determined for all groups of closely related counts, see *id.* §§ 3D1.1(a)(3), 3D1.4, that offense level determines the punishment that the Guidelines recommend be separately imposed (subject to any statutory maximum punishment) "on *each* * * * count" of conviction." *Id.* § 5G1.2(b) (emphasis added).

Next, the Guidelines address how to determine the total term of imprisonment under Section 3584. See *1983 Senate Report* 165 (stating that the Guidelines should address "the appropriateness of concurrent, consecutive, or overlapping sentences"). "If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment," the Guidelines recommend that (to the extent allowed by law) the "sentences on all counts [should] run concurrently." Sentencing Guidelines § 5G1.2(c). Otherwise, the sentencing court should direct that the "sentence imposed on one or more of the other counts shall run consecutively" "to the extent necessary" to produce what the court deems to be an appropriate total punishment. *Id.* § 5G1.2(d). That is done by considering "the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a))." *Id.* § 5G1.3, comment. (n.4(A)).

2. The Guidelines, however, instruct sentencing courts to modify that normal approach when Section 924(c) convictions are involved. Any count of conviction based on a statute like Section 924(c), for instance, in which Congress has specified a term of imprisonment and required that it run consecutively, is excluded from the Guidelines process above. Sentencing Guidelines § 5G1.2(b). The Guidelines instead provide that the sentence for each such count "shall be

determined by that statute and imposed independently." *Id.* § 5G1.2(a) & comment. (n.2(A)). Such a sentence must, as required by statute, be imposed consecutively to the Guidelines sentences for other offenses. *Ibid.*

The advisory Guidelines, whose advice the court must consider, also reflect the view that a judge may account for the fact of a Section 924(c) conviction in a particular, limited manner. When a defendant has an accompanying Section 924(c) conviction, the Guidelines do not apply an enhancement to the offense level for the predicate offense based on the defendant's use, carrying, or possession of a firearm during that offense. See Sentencing Guidelines § 2K2.4, comment. (n.4). Such an enhancement is unwarranted, the Commission concluded, because the Section 924(c) punishment specified by Congress already accounts for the distinct involvement of the firearm in the offense. See *id.* § 2K2.4, comment. (backg'd) ("To avoid double counting, when a sentence under [Section 924(c)] is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.").[8]

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[8] The district court followed the Guidelines' recommendation and did not apply a weapons enhancement to the offense level for petitioner's predicate and other non-Section 924(c) offenses when calculating his 84-to-105-month advisory Guidelines range. See PSR ¶¶ 19, 29; J.A. 15-17 (adopting relevant PSR calculations). The government did not appeal or cross-appeal from that Guidelines calculation or the district court's variance from the Guidelines range that produced 40-month concurrent terms of imprisonment for petitioner's non-Section 924(c) offenses. See J.A. 26-27 (variance). Cf. *Greenlaw* v. *United States*, 554 U.S. 237, 243-253 (2008).

Because the Guidelines are advisory, a district court exercising its sentencing discretion may still elect to enhance the punishment on the non-Section 924(c) conviction when a firearm is involved in the offense. But it may also consider that Congress has specified by statute a separate punishment under Section 924(c) for the *additional* danger of possessing or using a firearm during the predicate offense and consider that factor in exercising discretion when sentencing on the individual non-Section 924(c) count under Section 3553(a).

Section 924(c) does not prohibit a court from exercising its discretion in this manner. As noted, Congress amended Section 924(c) in 1984 to abrogate the Court's decisions in *Busic* and *Simpson*, which construed Section 924(c) as inapplicable if the statute prohibiting the offense that serves as the Section 924(c) predicate already included a weapons enhancement. See pp. 18-19, 34, *supra*. The 1984 amendment clarified that a predicate crime of violence or drug trafficking crime under Section 924(c) "includ[es]" an offense "that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. 924(c)(1)(A); see *Gonzales*, 520 U.S. at 10. That amendment did not address the separate question whether the district court has discretion to decide whether the actual sentence for the predicate offense must be increased for offense conduct separately addressed under Section 924(c).

F. Section 924(c) Does Not Restrict The Information Available To A Sentencing Judge But Does Limit How That Judge May Exercise Sentencing Discretion

Petitioner argues that a sentencing judge may nevertheless reduce the sentence for a predicate offense

based on the length of Section 924(c)'s mandatory prison term because, petitioner contends, prohibiting the judge from considering the length of that prison term would impermissibly limit the traditionally broad scope of information that a district court may consider when imposing a criminal sentence. Br. 2, 7-8, 19-21, 31-32 (relying upon 18 U.S.C. 3661 and *Pepper*, 562 U.S. 476). That argument is doubly flawed.

First, the government does not contend that a district court must blind itself to any relevant facts, nor does it argue that Section 3661 allows information to be excluded from the court's consideration. It is unclear whether Section 3661's reference to information concerning the "background, character, and conduct" of a defendant, 18 U.S.C. 3661, encompasses statutorily mandated sentences that must be imposed on other counts of conviction. But regardless, a district court can consider the fact that a Section 924(c) conviction punishes firearms conduct when deciding whether to impose a firearms enhancement for the predicate offense. See pp. 43-44, *supra*. What the sentencing court may not do is reduce the term of imprisonment on the predicate offense based on its view that the *length* of the prison term for the Section 924(c) conviction, *when added* to a prison term for the predicate, would produce a *total, aggregate length* of imprisonment that is greater than necessary in light of the Section 3553(a) factors. Cf. 18 U.S.C. 3584(b).

Second, the sentencing court's lack of authority to reduce a sentence for the predicate offense in order to offset Section 924(c)'s mandatory minimum does not derive from what type of information the court may consider. Rather, it derives from (1) the statutory provisions governing the court's imposition of the

particular term of imprisonment for that predicate and (2) the distinct provisions governing the total, aggregate length of imprisonment for multiple offenses. See pp. 21-29, *supra*. Just as a court cannot alter a statutorily mandated five-year sentence by considering more types of "information," neither can it reduce the length of a baseline term of imprisonment for the predicate offense in order to offset the fact that Section 924(c) imposes a mandatory-minimum sentence.

G. The Aggravated Identity Theft Provisions in Section 1028A Do Not Shed Reliable Light On The Meaning Of Section 924(c)

Finally, petitioner contends (Br. 24-25, 28) that the aggravated identity-theft statute codified at 18 U.S.C. 1028A shows that Congress has elsewhere adopted language prohibiting a sentencing court from "consider[ing] the effect of an additional mandatory minimum sentence when determining the proper sentence for the underlying conviction." Br. 28. Because Section 924(c) lacks similar text, petitioner asserts (Br. 24-25), Section 924(c) should be understood to allow a judge to reduce the term of imprisonment for the predicate offense in order to offset the impact of Section 924(c)'s consecutive term of imprisonment. That is incorrect. Section 1028A's prohibition serves a function distinct from and broader than that served by Section 924(c)'s sentencing provisions. In any event, Congress passed Section 1028A in 2004 in a separate enactment decades *after* the 1984 amendments that established Section 924(c)'s current sentencing framework. The subsequent passage of Section 1028A is an unreliable guide for inferring Congress's much earlier intent underlying Section 924(c).

1. Several aspects of Section 1028A are similar to Section 924(c), which plainly served as a starting point for the later enactment. In language that parallels Section 924(c), Section 1028A makes it unlawful to engage in identity theft "during and in relation to" certain predicate felony offenses and directs that the sentencing court shall impose a fixed, two-year prison term "in addition to," and consecutively with, "the punishment provided for [the predicate offense]." 18 U.S.C. 1028A(a)(1) and (b)(2). But unlike Section 924(c), the statute further provides that "a court shall not *in any way reduce* the term [of imprisonment] to be imposed for [the predicate] crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for [the identify-theft offense]." 18 U.S.C. 1028A(b)(3) (emphasis added).

That additional restriction in Section 1028A imposes a more significant limit on the discretion of a sentencing judge than Section 924(c). When a defendant has been convicted of both a Section 924(c) offense and a predicate offense, the sentencing judge has discretion to impose a prison term for the predicate that is lower than the sentence that the judge might have imposed in the absence of a Section 924(c) conviction for one particular reason: to account for the fact that Congress has already provided a sanction in Section 924(c) for the act of using, carrying, or possessing a firearm in connection with the predicate offense. See pp. 43-44, *supra*. The judge may therefore exercise discretion, when setting the specific term of imprisonment for the predicate offense, not to impose a firearm enhancement that would otherwise increase the separate term of imprisonment for that

predicate. See Sentencing Guidelines § 2K2.4, comment. (n.4 & backg'd) (recommending this course). By contrast, under the expansive text of Section 1028A(b)(3), the judge would be prohibited from considering that factor in its decision.

2. In any event, the language that Congress adopted in 2004 in Section 1028A is not a reliable guide for inferring the intent of a different Congress decades earlier in a different enactment.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted). The logical force of that general principle, however, is diluted when the language compared was enacted in different statutes at different times by different Congresses. Even in different parts of the same statute, Congress may convey the same concept using different language. See, *e.g.*, *Tyler* v. *Cain*, 533 U.S. 656, 664 (2001). And here, the language that petitioner identifies in Section 1028A, which carries a different and much broader prohibition than the sentencing provisions within Section 924(c), was enacted decades after Section 924(c)'s relevant sentencing provisions took shape. For the reasons previously discussed, when Section 924(c)'s text is read in context and in light of the sentencing provisions of the Sentencing Reform Act, Congress sufficiently expressed its intent to prohibit courts from zeroing out Section 924(c)'s additional punishment by reducing the sentence for a predicate offense.

Equally important, petitioner has failed to identify a plausible non-superfluous interpretation for Section 924(c)'s use of the phrase "in addition to the punishment provided [for the predicate offense]," 18 U.S.C. 924(c)(1)(A), and its distinct prohibition against running Section 924(c)'s term of imprisonment "concurrently" with any other term of imprisonment, 18 U.S.C. 924(c)(1)(D)(ii). His view would negate, rather than recognize, the distinctive sentencing relationship of the combination-crime that Congress proscribed in Section 924(c). That failure provides additional reason to reject petitioner's position.[9]

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[9] As a final submission, petitioner invokes (Br. 32-34) the rule of lenity. That invocation is misplaced. The rule of lenity is a tie-breaking rule of statutory construction that applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (citations and internal quotation marks omitted). As this Court has explained when construing Section 924(c), neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (citations and internal quotation marks omitted); see *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). Because petitioner's position cannot be squared with the text and structure of Section 924(c), as informed by the provisions of the Sentencing Reform Act, the rule of lenity has no application here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
DAVID BITKOWER
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DAVID B. GOODHAND
Attorney

JANUARY 2017

APPENDIX

1. 18 U.S.C. 924(c) (Supp. IV 1968) provided:

> (c) Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

2. 18 U.S.C. 924(c) (1970) provided:

> (c) Whoever—
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more

than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

3. 18 U.S.C. 924(c) (Supp. II 1984) provided:

(c) Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

4. 18 U.S.C. 924(c) provides in pertinent part:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short barreled rifle, short barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

* * * * *

5. 18 U.S.C. 1028A provides in pertinent part:

Aggravated identity theft

(a) OFFENSES.—

(1) IN GENERAL.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) TERRORISM OFFENSE.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) CONSECUTIVE SENTENCE.—Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

* * * * *

6. 18 U.S.C. 3551 provides in pertinent part:

Authorized sentences

(a) IN GENERAL.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) INDIVIDUALS.—An individual found guilty of an offense shall be sentenced, in accordance with the pro-visions of section 3553, to—

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section

3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

* * * * *

7. 18 U.S.C. 3553 provides in pertinent part:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * * * *

8. 18 U.S.C. 3582 provides in pertinent part:

Imposition of a sentence of imprisonment

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

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[1] So in original. The period probably should be a semicolon.

9. 18 U.S.C. 3584 provides:

Multiple sentences of imprisonment

(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

10. 18 U.S.C. 3661 provides:

Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.